

BEFORE THE INDIANA REAL
ESTATE COMMISSION
CAUSE NO: IREC 15-56

IN THE MATTER OF THE LICENSE OF)
)
BERT WHALEN)
)
LICENSE NO.: SP39500817 (Expired, Non-Renewable))



COMPLAINT

This complaint is brought against the real estate broker and real estate sales person licenses of Bert Whalen ("Respondent"), by the State of Indiana, by counsel, Attorney General Gregory F. Zoeller and Deputy Attorney General Samuel J. Dayton, ("Petitioner") and pursuant to Ind. Code § 25-1-7-7, Ind. Code § 25-1-7-2, Ind. Code art. 25-34.1, the Administrative Orders and Procedures Act, Ind. Code ch. 4-21.5-3, and Ind. Code § 25-1-11-1. In support, Petitioner alleges and states the following:

FACTS

1. Respondent's address on file with the Indiana Real Estate Commission ("Commission") is 12634 Shorevista Drive, Indianapolis, IN 46236.
2. Respondent is a licensed real estate salesperson holding license number SP39500817 (Expired, Non-Renewable), which expired June 30, 2010.
3. Respondent is the manager and/or member of Oceanpoint Investments LLC, an Indiana limited liability company.

CRIMINAL CONVICTIONS

4. On July 17, 1998, Respondent was convicted in Cause Number 49F19-9803-CM-031748 for operating a vehicle with a blood alcohol content of .08-.15%, a class C misdemeanor,

and the court sentenced Respondent to 60 days in jail with 58 days suspended and 180 days of criminal probation.

5. On October 31, 2001, Respondent was convicted in Cause Number 53C05-0007-DF-00375 for reckless driving, a class B misdemeanor, and the court sentenced Respondent to 180 days incarceration, with 120 days suspended, 12 months of criminal probation, and a \$240.00 fine.

6. On September 12, 2008, Respondent was arrested for operating a motorboat with a suspended driver's license.

7. On November 13, 2008, Respondent was convicted in Cause Number 29D06-0706-CM-2736 of operating a motorboat while intoxicated, a class C misdemeanor, and the court sentenced Respondent to 60 days incarceration, with 56 days suspended, 361 days of criminal probation, perform 180 hours of community service, and a 90-day driver's license suspension.

8. On February 4, 2009, Respondent was convicted in Cause Number 49F19-0809-CM-212959 of operating a motorboat with a suspended driver's license, a class A misdemeanor, and the court sentenced Respondent to 365 days in the Marion County Jail with 361 days suspended and suspended Respondent's driver's license for 180 days.

9. On February 22, 2012, Respondent was convicted in Cause Number 29D04-1103-CM-002910 of operating a vehicle while intoxicated, endangering a person, a class A misdemeanor, and the court sentenced Respondent to 40 days in the Hamilton County Jail and 180 days on home detention and suspended Respondent's driver's license for 90 days.

RENEWAL FRAUD

10. On December 31, 2009, Respondent submitted an online renewal for his real estate salesperson license and answered "No" for all questions, including question three, which

asked, "Since you last renewed, have you been convicted of or pled guilty to a violation of a federal or state law or are criminal charges pending?"

PROPERTY MANAGEMENT

11. On February 13, 2013, Respondent entered into a Property Management Agreement with American Pension Services, Inc., in which Respondent agreed to manage 4037 Catherwood, Indianapolis, Indiana 46226, for compensation.

12. Respondent also managed 4255 Dubarry Road, Indianapolis, IN 46226 ("4255 Dubarry") for American Pension Services, Inc.

13. On June 11, 2013, Respondent filed an eviction action in the Marion County Small Claims Court, Lawrence Township, Cause Number 49K03-1306-SC-003015, against tenant Brittany Doss who resided at 4255 Dubarry.

14. On July 29, 2013, Oceanpoint entered into a lease with Tamika Smith for 4255 Dubarry.

15. On November 11, 2013, Tamika Smith paid Six Hundred Fifty Dollars (\$650.00) to Respondent for rent at 4255 Dubarry.

16. Respondent deposited Tamika Smith's November 11, 2013, rental payment into a bank account that had not been designated as a trust account.

17. Respondent did not remit the Six Hundred Fifty Dollar (\$650.00) rental payment to American Pension Services, Inc.

COUNT I

18. Paragraphs one (1) through seventeen (17) are hereby incorporated by reference.

19. Respondent's conduct as described above constitutes a violation of Ind. Code § 25-1-11-5(a)(2)(B) in that Respondent has been convicted of a crime that is harmful to the

public. Respondent was convicted of operating a vehicle with a blood alcohol content of .08-.15%, a class C misdemeanor, on July 17, 1998.

COUNT II

20. Paragraphs one (1) through seventeen (17) are hereby incorporated by reference.

21. Respondent's conduct as described above constitutes a violation of Ind. Code § 25-1-11-5(a)(2)(B) in that Respondent has been convicted of a crime that is harmful to the public. Respondent was convicted of reckless driving, a class B misdemeanor, on October 31, 2001.

COUNT III

22. Paragraphs one (1) through seventeen (17) are hereby incorporated by reference.

23. Respondent's conduct as described above constitutes a violation of Ind. Code § 25-1-11-5(a)(2)(B) in that Respondent has been convicted of a crime that is harmful to the public. Respondent was convicted of operating a motorboat while intoxicated, a class C misdemeanor, on November 13, 2008.

COUNT IV

24. Paragraphs one (1) through seventeen (17) are hereby incorporated by reference.

25. Respondent's conduct as described above constitutes a violation of Ind. Code § 25-1-11-5(a)(2)(B) in that Respondent has been convicted of a crime that is harmful to the public. Respondent was convicted of operating a motorboat with a suspended driver's license, a class A misdemeanor, on February 4, 2009.

COUNT V

26. Paragraphs one (1) through seventeen (17) are hereby incorporated by reference.

27. Respondent's conduct as described above constitutes a violation of Ind. Code § 25-1-11-5(a)(2)(B) in that Respondent has been convicted of a crime that is harmful to the public. Respondent was convicted of operating a vehicle while intoxicated, endangering a person, a class A misdemeanor, on February 22, 2012.

COUNT VI

28. Paragraphs one (1) through seventeen (17) are hereby incorporated by reference.

29. Respondent's conduct as described above constitutes a violation of Ind. Code § 25-1-11-5(a)(1)(A) in that Respondent engaged in fraud or material deception in order to obtain a license to practice. Respondent failed to disclose that he had been arrested for operating a motorboat with a suspended driver's license on September 12, 2008, convicted for operating a motorboat while intoxicated on November 13, 2008, and convicted of operating a motorboat without a valid driver's license on February 4, 2009, when Respondent submitted his online license renewal application on December 31, 2009.

COUNT VII

30. Paragraphs one (1) through seventeen (17) are hereby incorporated by reference.

31. Respondent's conduct as described above constitutes a violation of Ind. Code § 25-1-11-5(a)(3) in that Respondent has knowingly violated a state statute or rule regulating the practice of real estate. Specifically, Respondent practiced property management without a valid license, which is unlawful pursuant to Ind. Code § 25-34.1-3-2(a).

COUNT VIII

32. Paragraphs one (1) through seventeen (17) are hereby incorporated by reference.

33. Respondent's conduct as described above constitutes a violation of Ind. Code § 25-1-11-5(a)(3) in that Respondent has knowingly violated a state statute or rule regulating the

practice of real estate. Respondent operated and/or managed a company that managed real estate without acting under the auspices of a principal broker, which, at all times relevant to this Complaint, was required of real estate salespersons pursuant to Ind. Code § 25-34.1-3-3.1(c).

COUNT IX

34. Paragraphs one (1) through seventeen (17) are hereby incorporated by reference.

35. Respondent's conduct as described above constitutes a violation of Ind. Code § 25-1-11-5(a)(4)(A) in that Respondent has continued to practice although he has become unfit to practice due to professional incompetence. Respondent failed to deposit the November 11, 2013, rent payment into a bank account clearly designated as a trust account, as required under Ind. Code § 25-34.1-4-5(a)(2), which, at all relevant times, was considered unprofessional conduct pursuant to 876 IAC 1-1-40(15).

COUNT X

36. Paragraphs one (1) through seventeen (17) are hereby incorporated by reference.

37. Respondent's conduct as described above constitutes a violation of Ind. Code § 25-1-11-5(a)(4)(A) in that Respondent has continued to practice although he has become unfit to practice due to professional incompetence by failing to remit the November 11, 2013, rent payment for 4255 Dubarry to American Pension Services, Inc. Failing to remit funds that come into a licensee's possession was considered unprofessional conduct pursuant to 876 IAC 1-1-40(1) at all relevant times.

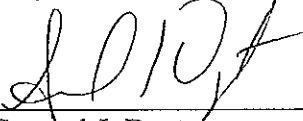
WHEREFORE, Petitioner requests an order against the Respondent that:

1. Imposes the appropriate disciplinary sanctions;
2. Directs Respondent to pay consumer restitution in an amount to be determined after a hearing;

3. Directs Respondent to pay a fee of Five Dollars (\$5.00) to be deposited into the Health Records and Personal Identifying Information Protection Trust Fund pursuant to Ind. Code § 4-6-14-10(b);
4. Directs Respondent to immediately pay all of the costs incurred in the prosecution of this case; and,
5. Provide any other relief the Commission deems just and proper under Ind. Code § 25-1-11-12.

Respectfully submitted,

GREGORY F. ZOELLER
Attorney General of Indiana
Attorney No.: 1958-98

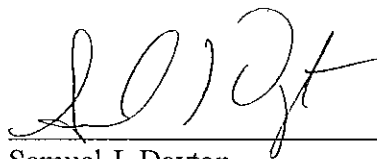
By: 
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of December, 2015, a true and correct copy of this Complaint was served upon the below-listed party via First Class U.S. Mail, postage prepaid.

Bert Whalen
12634 Shorevista Drive
Indianapolis, IN 46236

A handwritten signature in black ink, appearing to read "SDJ", is written over a horizontal line.

Samuel J. Dayton
Attorney No. 31822-49
Deputy Attorney General